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IN THE

Supreme Court of the United States

October Term, 1958

NO. 39

PAUL WILLIAMS and LORENA WILLIAMS, husband and wife, Petitioners,

v.

HUGH LEE, doing business as GANADO TRADING POST, Respondent,

On Writ of Certiorari to the Supreme Court of the State of Arizona

BRIEF FOR THE RESPONDENT

WM. W. STEVENSON,
203 Talkington Building,
Flagstaff, Arizona.

W. DEAN NUTTING,
111 East Hopi,
Holbrook, Arizona.
Counsel for the Respondent.

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BRIEF FOR THE RESPONDENT

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Those federal and state constitutional provisions, statutes, treaties, and regulations, that are involved in this brief are set forth in Appendix A, infra, pp. 11-14.

ARGUMENT

The courts of the State of Arizona retain jurisdiction of an action by non-Indian against Indian citizens

to enforce contractual obligations made within an Indian reservation where the United States has not affirmatively assumed jurisdiction.

As a basic premise, the authority and jurisdiction here challenged by Petitioners is vested in the state courts. The sovereignty of a state over its own territory and citizens is plenary. Absence of that authority and jurisdiction must result from (1) the delegation of that jurisdiction appearing in the United States Constitution or (2) a valid assumption of that jurisdiction by the federal government under its constitutional powers.

The effectiveness of state law to reach Indians and into Indian Reservations was stated by this Court in U. S. vs. McGowan, et al., 302 U. S. 535:

> "Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony (reservation), of such state laws as conflict with the federal enactments."

The court below based its opinion on the foregoing proposition, and in support thereof cited the following authorities:

> "We do not question the authority of the federal government over tribal Indians and its right to deprive the state courts of jurisdiction to try and determine litigation of the nature herein involved, but we think the correct statement of the rule is that enunciated by Prof. Ray A. Brown, an eminent authority on Indian law, in his article, The Indian Problem and the Law, 39 Yale Law Journal, pages 314-315. The rule is stated in the following language:

"'While the theory of tribal allegiance and federal guardianship has served in criminal matters to place the Indian in a special category, such has not generally been the result in matters of civil rights. The Indian, whether tribal and a ward of the government or not, may, except where specially restricted by act of Congress, make contracts, acquire and dispose of property, and sue and be sued in the state or federal courts.' (Emphasis ours.)

"To the same effect, 42 C.J.S., Indians, § 86:

"'* * * an Indian may be sued in the state courts in any matter over which the United States has not expressly retained jurisdiction. Where not prohibited by statute, Indians may be sued on contracts or in tort.'

"Many courts have recognized the right of state courts to assume jurisdiction over disputes between Indians and whites. Swartzel v. Rogers, 3 Kan. 374, was a suit between Shawnee Indians to partition land located on the reservation. After declaring there was nothing to show the property was restricted, the court said:

"'The fact that the contestants are Shawnee Indians, did not deprive the district court nor does it forbid to this court the exercise of jurisdiction either as to parties or subject matter. That the property belongs to Indians is not sufficient to place it beyond the jurisdiction of the state courts; and if the subject matter be within their jurisdiction, the parties, whether Indians or white men, have the right to litigate about it therein.'

"That case was cited as authority by the United States Supreme Court in the case of Felix v. Patrick, 145 U. S. 317, 12 S. Ct. 862, 36 L. Ed. 719. Stacy v. LaBelle, 99 Wis. 520, 75 N. W. 60, 41 L. R. A. 419, was a suit in the state court against an Indian for a balance due on account for goods, wares and merchandise sold to the Indian by the plaintiff who was an Indian trader on the reservation operating under and by virtue of a license issued by the United States. It was held the state court had jurisdiction. Red Hawk v. Joines, 129 Ore. 620, 278 P. 572, was an action brought by an Indian who was an allottee without final patent on the Umatilla Indian reservation against a white man to replevy cattle taken from the Indian's possession. State jurisdiction was sustained with a very thorough discussion of the problem of jurisdiction over the Indian, his personal property and over the reservation. Bonnett v. Seekins, 126 Mont. 24, 243 P. 2d 317, was a case where the Indian brought suit against a white to recover rent due under a lease of land held under an allotment. The lease had been approved by the Indian agency. It was held the state court had jurisdiction. To the same effect is Stevenson v. Christie, 64 Ark. 72, 42 S. W. 418, which was a suit by a white man against an Indian on a contract made in Indian territory as the result of the operation by the white man of a mercantile business in the Indian territory.

"There are cases such as is before this court that were tried in the state courts wherein jurisdiction was apparently conceded or at least not presented. Tinker v. Midland Valley Mercantile

Co., 25 Okla. 160, 105 P. 333. This was a suit by an Indian trader against an Indian on a promissory note which defendant contended was void because it was for credit given in excess of that authorized by statute. The case was reviewed by the United States Supreme Court and reversed but not on jurisdictional grounds. Tinker v. Midland Valley Mercantile Company, 231 U. S. 681, 34 S. Ct. 252, 58 L. Ed. 434." (R. 57-59)

The pertinent question, then, is whether by the terms of the U. S. Constitution or by the enactments of the federal government passed to protect Indian wards, the United States has jurisdiction over an action by a non-Indian against a Navajo Indian to enforce a contractual obligation arising on the Navajo Indian Reservation.

THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT DELEGATE SUCH JURISDICTION TO THE UNITED STATES.

Under the commerce clause the federal government may regulate commerce with the Indians. The essence of commerce is the buying, selling and exchanging of commodities. U. S. v. Holliday, 3 Wall 407. The enactment by the federal government of such regulations relating to commerce does not constitute an assumption of jurisdiction by the United States to enforce a contractual obligation. It merely limits the state courts to the extent that state law which may conflict with these regulations must give way. U. S. v. McGowan, 302 U. S. 535.

THE ARIZONA ENABLING ACT (36 U. S. Stat. 557, 568-579) DID NOT DEPRIVE THE STATE OF THIS JURISDICTION.

That act provided, upon compliance with the stated conditions, that Arizona be admitted into the Union on an equal footing with other states; further, that those lands acquired by Indians comprising Indian Reservations should be exempt from taxation by the state so long as Congress prescribes, and that such lands should remain under the jurisdiction of the Congress of the United States. (infra, p. A. 11).

The Enabling Act of the State of Montana, which has provisions identical with the foregoing, was interpreted in Draper vs. U. S., 164 U. S. 240, to mean that the disclaimer referred to Indian lands, not Indian people, and the contention therein advanced that the enabling act "thereby divested the state pro tanto of equal authority and jurisdiction over its citizens, usually enjoyed by other states of the union" was rejected. Thus the disclaimer in Arizona's Enabling Act, in the light of the Draper decision did not constitute an assumption of authority by the United States divesting Arizona of jurisdiction in the instant case.

IN ANSWER TO PETITIONERS

Petitioners' contention that state law is ineffective to reach Indians except insofar as Congress has specifically and expressly made them subject to such law is based upon the fallacious assumption that the source of all jurisdiction, power and authority is vested in the federal government and that the states have only such jurisdiction, power and authority as may be delegated to them by the federal government. This proposition runs headlong into Amendment X

to the United States Constitution (infra. p. A. 13) wherein all powers not specifically delegated to the federal government are reserved to the states.

The federal government in the role of guardian of its Indian wards has not assumed jurisdiction over actions of the instant type, and Arizona has never relinquished that jurisdiction.

Petitioners cite Worcester v. Georgia, 6 Pet. 515, in support of their contention. However, that case is not in point.

The Cherokee Nation was recognized as a political sovereign by Great Britain. The United States succeeded to this position. The Cherokee Nation, as a separate political and governmental entity, entered into various treaties with Great Britain and the United States. The Cherokee Country was separate from Georgia. The United States was pledged to restrain its citizens from trespassing thereon without a passport. The United States recognized the pre-existing power of the Cherokee Nation to govern itself.

Contrast the foregoing with the instant fact situation. The United States succeeded to the position of Mexico regarding the Navajos and the land that now comprises the Navajo Reservation by the treaty of Guadalupe Hidalgo, February 2, 1848 (9 Stat. 922). Political sovereignty of the Navajos was recognized by no one, because, in fact, there was no sovereign.

> "About a century ago when the territory occupied by the Navajos became a part of the United States there was no such thing as a Navajo Tribe in the political sense. There were local leaders or headmen * * * but no hereditary chiefs with coercive powers, and no representative governing

body with either persuasive or coercive powers over the whole tribe. * * *

"Treaties were made between the military and the Tribe through the headmen, and administrative personnel attempted to control the Tribe, implement programs and institute policies through the same medium. In fact there was a time when, if designated headmen failed to achieve desired results, they were replaced by puppet "headmen" armed with badges and documentary proof of authority—needless to say, such "leaders" were powerless." Young, Robert W. (Editor), "The Navajo Yearbook of Planning in Action," Report No. V, Calendar Year 1955, page 112, Navajo Agency, Window Rock, Arizona, 1955.

Indeed, when the Tribal Council was first organized by the federal government in 1923, it was not for the purpose of self-government but for the better administration of the natural resources of the reservation. (See Preamble to the 1923 Regulations, infra, p. A. 14.) The political entity known as the Navajo Tribe was an artificial creature of the federal government, not a recognized nation as was the Cherokee, and Arizona's territorial jurisdiction over the Navajo Reservation is admitted (Br. 15) while in the Worcester case the Cherokee Country was separate from Georgia, and a passport was required to enter therein.

Petitioners cite Ex Parte Crow Dog, 109 U. S. 556, and United States vs. Kagama, 118 U. S. 375, drawing from these cases the conclusion that "unless Congress has specifically consented to the exercise of Arizona's jurisdiction over the Navajo Indians, the Arizona

courts have no jurisdiction of the present action." (Br. 10-11). However, the former case held that there was no federal jurisdiction to punish the murder of one Indian by another on a reservation. Congress then enacted affirmative legislation, designed to protect their Indian wards, making such offenses triable in federal courts. Subsequently the latter case held that the matter could be tried in federal court. Jurisdiction, then, was retained by the state until the federal government affirmatively assumed the same.

The many pages in Petitioners' Brief devoted to the inferred interpretation of the law by an individual president or congress but points up the lack of decisions sustaining Petitioners' position. Such purported interpretation of the law is immaterial.

The opinion of the court below is challenged for stating that if Petitioners' reasoning were sound, that is to say, if state agents could enter upon the reservation only for specific health and educational reasons and not to serve process or make an arrest, "a white man could murder another white man on or off an Indian Reservation and would be secure from Arizona prosecution so long as he could remain within the boundaries of a reservation." Petitioners, however, vigorously argued before the Arizona Supreme Court that officers of the state could not enter upon the reservation, and invited the Arizona court to ponder the above theoretical situation.

CONCLUSION

The State of Arizona retains authority and jurisdiction equal to that enjoyed by other states of the union over all its citizens, whether Indian or non-Indian,

subject to the limitation that this authority and jurisdiction gives way to federal enactments passed to protect Indian wards. Thus, only insofar as the United States has affirmatively assumed jurisdiction, is the state deprived thereof.

We therefore respectfully submit that the judgment below should be affirmed.

WM. W. STEVENSON
203 Talkington Building
Flagstaff, Arizona
W. DEAN NUTTING
111 East Hopi
Holbrook, Arizona
Counsel for the Respondent

APPENDIX

Constitutional, Statutory, and Regulatory Provisions Involved:

1. The Enabling Act of the State of Arizona, Act June 20, 1910, c. 310, 36 U. S. Stat. 557, 568-579, provides, in pertinent part:

"Section 20

"Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reserva-

tion owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe."

* * * * * * * *

"Section 23

"That said constitutional convention shall, by ordinance, provide that in case of the ratification of said constitution by the people, and in case the President of the United States and Congress approve the same, or in case the President approve the same and Congress fails to act in its next regular session, all as hereinbefore provided, an election shall be held at the time named in the proclamation of the governor of Arizona, provided for in the preceding section, at which election of officers for a full state government, including a governor, members of the legislature, one Representative in Congress, and such other officers as such constitutional convention shall prescribe, shall be chosen by the people. Such election shall be held, the returns thereof made, canvassed, and certified to by the Secretary of said Territory, in the same manner as in this Act prescribed for the making of the returns, the canvassing and certification of the same of the election for the ratification or rejection of said constitution, as hereinbefore provided, and the qualifications of the voters at said election for all state officers, members of the legislature, County officers, and Representative

in Congress, and other officers prescribed by said constitution shall be made the same as the qualifications of voters at the election for the ratification or rejection of said constitution, as hereinbefore provided. When said election of state and county officers, members of the legislature, and Representative in Congress, and other officers above provided for shall be held and the returns thereof made, canvassed, and certified, as hereinbefore provided, the governor of the Territory of Arizona shall certify the result of said election as canvassed and certified, as herein provided, to the President of the United States, who thereupon shall immediately issue his proclamation announcing the result of said election so ascertained, and upon the issuance of said proclamation by the President of the United States the proposed State of Arizona shall be deemed admitted by Congress into the Union by virtue of this Act on an equal footing with other States. Until the issuance of said proclamation by the President of the United States, and until the said State is so admitted into the Union and said officers are elected and qualified under the provisions of the Constitution, the County and Territorial officers of said Territory, including the Delegate in Congress thereof elected in the general election in nineteen hundred and eight, shall continue to discharge the duties of their respective offices in and for said Territory: Provided, that no session of the Territorial Legislative Assembly shall be held in nineteen hundred and eleven."

2. The Constitution of the United States provides, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. The preamble to regulations promulgated in 1923 by E. D. Merritt, acting Commissioner of Indian Affairs, in accordance with which the Navajo Tribal Council was organized, provided:

"The Navajo Indian Reservation situated in the States of Arizona, New Mexico and Utah, being extensive in area and the number of Indians of said Navajo Tribe having rights therein being numerous and widely distributed in their habitat, and in order to promote better administration of the affairs of the Navajo Tribe of Indians in conformity to law and particularly as to matters in which the Navajo Tribe at large is concerned such as oil, gas, coal and other mineral deposits, tribal timber and development of underground water supply for stock purposes, etc., the following regulations are hereby prescribed and promulgated . . ."